Kwan Chew Holdings Sdn Bhd v Kwong Yik Bank Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–427 OF 2000
GOPAL SRI RAM, HASHIM AND ZALEHA ZAHARI JJCA
14 AUGUST 2006

Banking — Banker and customer — Breach of agreement to provide end-finance facility — Relationship between banker and customer — Whether relationship changed in mid-stream — Whether court can look at the background to the contract to determine the objective aim or purpose of the transaction

Contract — Breach — End-finance arrangement — Whether defendant had acted in breach of contract — Overdraft facility granted by the bank — Whether its true character is in fact a bridging loan

The appellant/plaintiff was at all material times a customer of the defendant/respondent bank. The plaintiff was a member of a group of companies all of whom were also the defendant's customers. The plaintiff's case is that the defendant in breach of contract failed to make available to it funds that it had already promised to the former. In consequence of that breach the plaintiff's housing development, known as 'the Taman Dangi project' could not be completed resulting in losses to the plaintiff. The plaintiff had three overdraft facilities with the defendant each of which was secured by a charge over the titles to the Taman Dangi land. The total sum made available was RM550,000. There is a letter dated 31 March 1986, from the defendant to the plaintiff referring to a drawing limit of RM520,000. This forms the subject of complaint by the plaintiff whose case is that, based on the undisputed documentary evidence, it had a facility of RM550,000 as a bridging loan for the Taman Dangi project. On 30 March 1987, an end financing agreement was entered into between the plaintiff and the defendant where the defendant offered the plaintiff an end finance facility of RM1 million. By 30 September 1987, the defendant had approved end finance loans for 16 purchasers. Although as at 10 October 1988 the defendant had approved end finance of RM185,300, this sum was never credited to the plaintiff's account. Further, there were nine purchasers in respect of whom the defendant had approved loans, obtained charges in escrow but had not credited the monies due under the end finance agreement to the plaintiff's account. The defendant's delay in crediting the plaintiff's account with the sums representing the loans approved to the end-purchasers resulted in the plaintiff's overdraft ballooning with interest payable at 14% pa with monthly rests. The next event took place on 18 September 1987 when by a letter of that date the defendant appointed a firm of accountants called Hanafiah Raslan & Mohamad as the independent accountant for the Taman Dangi project to monitor the progress of development and to take control income from the sales of units and payments to creditors. The defendant made the independent accountant a compulsory signatory

of the plaintiff's cheques. The independent contractor confirmed that as at the date of his appointment 95% of the project had been completed and that a mere RM101,200 was required to complete the project and have the certificate of fitness issued. The appointment of the independent accountant had no positive effect as the defendant continued to dishonour cheques despite the fact that they had been signed by the independent accountant, signifying the necessity and the propriety of the payments. Later the defendant by its letter of 5 November 1987 informed the plaintiff of a restructure of the repayment of the sums owed by the plaintiff. The upshot of the restructure was that the total sale price of all the 36 units of houses at Taman Dangi was determined to be RM1,698,000. Further, it was determined by the parties — and there appears to be consensus ad idem about this — that the plaintiff had collected a sum of RM419,172. It followed that there was a sum of RM1,278.828 receivable by the plaintiff from the end purchasers. This sum was amply sufficient to settle the plaintiff's debt to the defendant which at the date of the defendant's letter (5 November 1987) stood at RM 770,497.66. The Taman Dangi housing project stalled for want of funds and was eventually completed by the Tabung Projek Perumahan Terbengkalai or TPPT which is the body established by Government to deal with and complete abandoned housing projects so that end purchasers would not unduly suffer. Later, the plaintiff took out proceedings to recover damages for breach of contract from the defendant which was dismissed by the high court. The learned counsel for the defendant submitted that there was here merely an overdraft and not a bridging loan. The main issue in this appeal is whether the defendant had acted in breach of contract.

Held, allowing the appeal:

(1) When a court is asked to determine the true nature of the bargain between contracting parties it is required to take an objective approach. It must have regard to the factual matrix forming the background to the contract to determine the objective aim or purpose of the transaction. It is the objective view based on the test of the reasonable man that is the determining factor and not the subjective view of a party to the contract (see para 17).

(2) Having regard to the background of the surrounding circumstances in which the facility was granted as well as the objective aim of the transaction, there is no doubt whatsoever that the money that was lent by way of the overdraft in this case was in fact a bridging loan for the Taman Dangi project. It was not a true overdraft as ordinarily understood between a banker and his customer. Its true character as a bridging loan is revealed when looking at the purpose of the whole transaction in its proper context and against the matrix of fact forming the background. The background of circumstances in this case includes, of course the knowledge of the defendant of the purpose of the whole transaction (see para 25).

(3) The fact is first, the sum agreed to be lent was RM550,000. But the defendant arbitrarily and unilaterally reduced this to RM520,000. In addition to this is the undisputed fact that the defendant had delayed in releasing into the plaintiff's account loans already approved by way of end finance (see paras 29–30). If the question is asked, who caused the collapse of the Taman Dangi

project, an objective view of the facts and evidence shows that it was the defendant. There is therefore no doubt that the defendant was clearly in breach of contract (see para 35).

(4) The documentary evidence shows that throughout their business relationship, the defendant regarded the plaintiff and the group of companies to which it belonged as one and the same entity. Having conducted itself in this fashion towards the plaintiff, it is not open to the defendant to change its stance now and choose to treat each company in the group as a different entity. It is not a question of the court lifting the corporate veil or the companies in the group being treated as a single economic unit. It is merely an example of equity acting in personam whereby the defendant is estopped from asserting that each company in the plaintiff's group of companies is a distinct and separate entity because it would be unjust for it to do so (see para 36).

(5) This is a case in which the relationship between the parties began as one of banker and customer simpliciter. It was a purely contractual relationship. The defendant was the lender and creditor and the plaintiff was the borrower and debtor. However, in mid-stream, this relationship of debtor and creditor appears to have had superimposed on it another special relationship (see para 40); *Shanti Prasad Jain v Director of Enforcement* AIR 1962 SC 1764; *Midland Bank Ltd v Conway Borough Council* [1965] 2 All ER 972 followed.

(6) The special relationship is fiduary in nature. In other words, upon the defendant appointing the independent accountant as compulsory signatory of all the plaintiff's cheques, the defendant stood in a fiduciary position to the plaintiff as the latter's joint venturer. Although there is no formal written joint venture agreement, it is open to a court on an objective assessment of the proved and admitted facts to conclude that the true relationship between litigating parties was a joint venture. The defendant as a joint venturer stood in a fiduciary position to the plaintiff in relation to the approval and disbursement of the end finance (see paras 42, 44).

[Bahasa Malaysia summary

Perayu/plaintif adalah pada setiap masa pelanggan defendan/responden bank. Plaintif merupakan ahli kumpulan-kumpulan syarikat yang mana kesemuanya juga merupakan pelanggan defendan. Kes plaintif ialah bahawa defendan telah melanggar kontrak dalam kegagalannya menyediakan wang biayaan yang telah dijanjikan kepada plaintif. Disebabkan oleh perlanggaran kontrak tersebut, pembangunan perumahan plaintif yang dikenali sebagai 'projek Taman Dangi tersebut' tidak dapat diselesaikan dan menyebabkan kerugian kepada plaintif. Plaintif mempunyai tiga kemudahan overdraf dengan defendan setiap dari mereka dicagarkan dengan satu gadaian ke atas hak milik tanah Taman Dangi. Jumlah kesemuanya yang diberikan ialah RM550,000. Terdapat satu surat bertarikh 31 Mac 1986, daripada defendan kepada plaintif yang merujuk kepada had pengeluaran sebanyak RM520,000. Ini merupakan pertikaian plaintif di mana kesnya ialah, berdasarkan kepada bukti dokumen yang tidak dipertikaikan, ia mempunyai satu kemudahan untuk RM550,000 sebagai satu pinjaman bersepadu untuk projek Taman Dangi. Pada 30 Mac 1987, satu perjanjian pembiayaan terakhir dimasukkan di antara

plaintif dan defendan di mana defendan menawarkan plaintif satu kemudahan pembiayaan terakhir sebanyak RM1 juta. Sehingga 30 September 1987, defendan telah meluluskan pinjaman kewangan terakhir untuk 16 pembeli-pembeli. Walaupun setakat 10 Oktober 1988, defendan telah meluluskan pembiayaan terakhir sebanyak RM185,300, jumlah ini tidak pernah dimasukkan ke dalam akaun plaintif. Seterusnya, terdapat sembilan pembeli-pembeli di mana defendan telah meluluskan pinjaman, memperoleh gadaian dalam eksrow tetapi tidak memasukkan pembayaran wang di bawah perjanjian pembiayaan terakhir ke dalam akaun plaintif. Kelewatan defendan dalam memasukkan wang-wang di mana pinjaman pembiayaan terakhir telah diluluskan ke dalam akaun plaintif menyebabkan overdraf plaintif meningkat dengan faedah yang kena dibayar pada kadar 14% setahun pada kiraan bulanan. Kejadian yang seterusnya berlaku pada 18 September 1987 apabila satu surat yang sama tarikh oleh defendan melantik satu firma akauntan yang dikenali sebagai Hanafiah Raslan & Mohamad sebagai akauntan bebas untuk projek Taman Dangi untuk mengawas pemajuan dan mengambil alih pendapatan yang diperoleh daripada penjualan unit-unit dan pembayaran kepada pemiutang-pemiutang. Defendan mewajibkan akauntan bebas sebagai penandatangan cek-cek plaintif. Akauntan bebas mengesahkan setakat tarikh pelantikannya 95% projek tersebut telahpun diselesaikan dan hanya jumlah RM101,200 yang diperlukan untuk menyelesaikan projek tersebut dan sijil penghunian dikeluarkan. Pelantikan akauntan bebas tidak mendatangkan sebarang efek yang positif oleh kerana defendan terus tidak menunaikan cek-cek walaupun ia ditandatangani oleh akauntan bebas tersebut, yang menunjukkan keperluan dan kesesuaian pembayaran-pembayaran tersebut. Seterusnya defendan melalui suratnya bertarikh 5 November 1987 memaklumkan kepada plaintif pembayaran balik jumlah yang dihutang telah disusunkan semula. Penyusunan semula ini ialah jumlah harga belian kesemua 36 unit rumah di Taman Dangi ditentukan sebanyak RM1,698,000. Selanjutnya, ia juga ditentukan oleh semua pihak-pihak — dan nampaknya terdapat consensus ad idem berhubung dengan ini — bahawa plaintif telah memungut jumlah wang RM419,172. Berikutan itu, terdapat jumlah wang RM1,278.828 yang belum diterima oleh plaintif daripada pembeli-pembeli. Jumlah ini lebih daripada mencukupi untuk menyelesaikan hutang plaintif kepada defendan di mana setakat tarikh surat defendan (5 November 1987) berjumlah RM770,497.66. Projek perumahan Taman Dangi tergendala oleh kerana tiada wang dan seterusnya ia diselesaikan oleh Tabung Projek Perumahan Terbengkalai atau TPPT iaitu sebuah badan yang ditubuhkan oleh Kerajaan untuk menyelesaikan projek-projek perumahan yang terbengkalai supaya pembeli-pembeli tidak menderita. Selepas ini, plaintif telah mengambil tindakan untuk mendapatkan ganti rugi untuk pelanggaran kontrak daripada defendan yang ditolak oleh mahkamah tinggi. Peguamcara defendan yang bijaksana menghujahkan bahawa hanya terdapat satu overdraf di sini dan bukannya satu pinjaman bersepadu. Isu utama dalam rayuan ini ialah sama ada defendan telah melanggar kontrak.

Diputuskan, membenarkan rayuan tersebut:

(1) Apabila mahkamah dipanggil untuk menentukan sifat sebenarnya perjanjian di antara pihak-pihak yang mengikat kontrak, ia perlu mengambil pendekatan yang objektif. Ia mesti mengambil kira fakta-fakta matrix yang membentuk latar belakang kontrak tersebut untuk menentukan matlamat objektif atau

tujuan transaksi tersebut. Ia merupakan pandangan yang objektif berdasarkan atas ujian orang yang munasabah yang menentukan faktor dan bukannya pandangan subjektif pihak-pihak kontrak tersebut (lihat perenggan 17)

(2) Dengan mengambil kira latar belakang dan keadaan-keadaan sekeliling di mana kemudahan itu diberikan dan juga matlamat objektif transaksi tersebut, tiada keraguan langsung bahawa wang yang dipinjamkan melalui overdraf dalam kes ini adalah sebenarnya satu pinjaman bersepadu untuk projek Taman Dangi tersebut. Ia bukan sebenarnya satu overdraf dalam erti yang biasa difahami di antara bank dan pelanggannya. Sifat sebenarnya sebagai pinjaman bersepadu dapat diperlihatkan apabila melihat tujuan transaksi tersebut secara keseluruhannya dalam konteks dan terhadap fakta-fakta matrix yang membentuk latar belakangnya. Latar belakang keadaan kes ini termasuk, pengetahuan defendan akan tujuan keseluruhan transaksi ini (lihat perenggan 25).

(3) Fakta pertama, ialah jumlah yang dipersetujui untuk dipinjamkan ialah RM550,000. Akan tetapi defendan secara suka hati dan secara sendiri mengurangkannya kepada RM520,000 Tambahan kepada ini, fakta yang tidak dipertikaikan bahawa defendan telah lewat dalam melepaskan ke dalam akaun plaintif pinjaman-pinjaman yang telah diluluskan melalui pinjaman terakhir (lihat perenggan 29–30). Sekiranya soalan ditanya, siapakah yang menyebabkan runtuhan projek Taman Dangi tersebut, satu pandangan objektif dapat dilihat daripada fakta-fakta dan bukti yang menunjukkan bahawa ia adalah defendan. Dengan itu tiada keraguan bahawa defendan dengan jelasnya melanggar kontrak tersebut (lihat perenggan 35).

(4) Bukti-bukti daripada dokumen menunjukkan bahawa di sepanjang hubungan perniagaan mereka defendan menganggap plaintif dan kumpulan-kumpulan syarikatnya sebagai dipunyai oleh entiti yang sama. Dalam berkelakuan sedemikian terhadap plaintif, ia tidak lagi dibuka kepada defendan untuk menukarkan pendiriannya sekarang dan memilih untuk menyifatkan setiap syarikat dalam kumpulan itu sebagai entiti yang berlainan. Ia bukannya soal mahkamah mengangkat selubung perbadanan atau syarikat-syarikat dalam kumpulan tersebut dianggap sebagai satu unit ekonomik. Ia hanya satu contoh penggunaan ekuiti in personam di mana defendan diestop daripada menyatakan bahawa setiap syarikat di dalam golongan syarikat-syarikat plaintif adalah satu entiti yang berbeza dan berlainan oleh kerana ia tidak adil untuknya berbuat demikian (lihat perenggan 36).

(5) Ini adalah satu kes di mana perhubungan di antara pihak-pihak bermula sebagai sebuah bank dan pelanggannya simpliciter. Ia semata-mata satu perhubungan kontraktual. Defendan merupakan pemberi pinjaman dan kreditor dan plaintif peminjam dan penghutang. Akan tetapi, di pertengahan, perhubungan penghutang dan kreditor nampak seperti telah ditindih di atasnya satu perhubungan yang istimewa (lihat perenggan 40); *Shanti Prasad Jain v Director of Enforcement* AIR 1962 SC 1764; *Midland Bank Ltd v Conway Borough Council* [1965] 2 All ER 972 diikut.

(6) Perhubungan istimewa ini adalah bersifat fidusiari. Dalam perkataan lain, apabila defendan melantik seorang akauntan yang bebas sebagai

penandatangan yang diwajibkan pada kesemua cek-cek plaintif, defendan berdiri di atas pendirian fidusiari kepada plaintif sebagai pengusaha sama. Walaupun tiada perjanjian pengusaha sama rasmi bertulis, adalah terbuka kepada mahkamah atas penilaian yang objektif berdasarkan fakta-fakta yang terbukti dan diakui untuk memutuskan bahawa perhubungan yang sebenarnya di antara pihak-pihak dalam pembicaraan adalah satu pengusaha sama. Defendan sebagai pengusaha sama berdiri di atas pendirian fidusiari kepada plaintif berhubungan dengan kelulusan dan pembayaran kewangan akhir (lihat perenggan 42, 44).]

Notes

For a case on breach of agreement to provide end-finance facility, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1807.

For a case on end-finance arrangement, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 2307.

Cases referred to

Adams v Cape Industries Plc [1990] Ch 433 (refd)
Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191 (refd)
Bank of Credit and Commerce International SA v Munawar Ali [2001] UKHL 8 (refd)
Bill Keh Lung v Don Xia [2003] 679 HKCU 1 (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282 (refd)
DHN Food Distributors Ltd v Tower Hamlets London Borough Council [1976] 1 WLR 852 (refd)
Ganam Rajamany v Somoo Sinnah [1984] 2 MLJ 290 (refd)
Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All ER 98 (refd)
Jakiuddin v Vithoba AIR 1939 Nag 301 (refd)
Johnson v Murray [1951] 2 WWR (NS) 447 (refd)
Karthiyayani & Anor v Lee Leong Sin & Anor [1975] 1 MLJ 119 (refd)
Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd [1984] 1 MLJ 24
Lever Brothers Ltd v Bell [1931] 1 KB 557 (refd)
Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749 (refd)
MBF Finance Bhd v Low Ping Ming t/a Low Ping Enterprise [2005] 3 MLJ 208 (refd)
Meinhard v Salmon (1928) 249 NY 456 (refd)
Midland Bank Ltd v Conway Borough Council [1965] 2 All ER 972 (folld)
Mirzamal Bhagwan Das v Rameshwar AIR 1929 All 536 (refd)
Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474 (refd))
Pole v Leask (1860) 54 ER 481 (refd)
Prenn v Simmonds [1971] 3 All ER 237 (refd)
Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600 (refd)
Shanti Prasad Jain v Director of Enforcement AIR 1962 SC 1764 (folld)
Steward v Donnelly [2001] 108 ACWS (3d) 715 (refd)
Woolfson v Strathclyde Regional Council [1978] SLT 15 (refd)
Contract Act 1950 s 40

Ramdas Tikamdas (Siva Ram & Associates) for the appellant.
K Anantham (Skrine) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] The main, if not the only issue in this appeal is whether the defendant was in breach of contract. The argument urged in support of the appeal is that the High Court's finding to the contrary is flawed. The facts out of which the dispute arose are fairly straightforward and in the main undisputed. Here they are.

[2] The plaintiff (appellant before us) was at all material times a customer of the defendant bank (the respondent before us). It was a member of a group of companies all of whom were also the defendant's customers. Indeed, it cannot be gainsaid that at all material times the defendant conducted itself towards all these companies as if they were one and the same entity with the defendant looking to the plaintiff as the 'flagship' entity to settle any and all monies owed to the defendant by the other companies in the group. The plaintiff's case is that the defendant in breach of contract failed to make available to it funds that it had already promised to the former. In consequence of that breach the plaintiff's housing development, known as 'the Taman Dangi project' could not be completed resulting in losses to the plaintiff.

[3] There is no dispute that the plaintiff had three overdraft facilities with the defendant each of which was secured by a charge over the titles to the Taman Dangi land. The total sum made available was RM550,000. The defendant knew that the true purpose of the facility viz., that it was a bridging facility. That is to say, it was to be used by the plaintiff for the housing development. That comes across quite clearly from the evidence of the defendant's witness DW3 given under cross-examination.

[4] Let me at this stage say a word about the third overdraft facility. This was for a sum of RM150,000. It was a term of the contract between the plaintiff and the defendant that this sum of RM150,000 would be released progressively against an architect's certificates of works done on roads and drainage in respect of the housing development project. Admittedly, the plaintiff only produced architect's certificates for up to RM120,000.

[5] Each of the charges executed by the plaintiff in the defendant's favour contained the following two clauses:

> 4. Subject always to the provisions of the clause next following the interest on any principal moneys for the time being hereby secured including capitalised interest shall at the end of each calendar month be capitalised and added for all purposes to the principal sum then owing and shall thenceforth bear interest at the Prescribed Rate and be secured and payable accordingly and all the covenants and conditions contained in or implied by these presents and all powers and remedies conferred by law or by these presents and all rules of law or equity in relation to the said principal sum and interest shall equally apply to such capitalised arrears of interest and to interest on such arrears.

5. For the purpose of ascertaining whether the limit of the principal intended to be hereby secured has been exceeded or not all accumulated and capitalized interest shall be deemed to be interest and not principal sum.

These are important provisions. On their plain reading, they exclude accumulated interest when determining whether the plaintiff had exceeded the limit of its overdraft. I will deal with the arguments of the parties with regard to these clauses and matters appurtenant to them later in this judgment.

[6] The next item of importance in the chronology of events is a letter from the defendant to the plaintiff that is dated 6 February 1985 and marked as 'Final Reminder'. It refers to an outstanding sum of RM544,587.86 as at 5 February 1985 and goes on to say this:

> We refer to our repeated reminders and note that your account is overdrawn by $24,587.86 as at 5 February 1985.
>
> You are requested to regularise your account within 10 days from the date hereof, failing which we shall have no alternative but to institute legal proceedings against you to recover the whole outstanding balance.

[7] This letter of 6 February 1985 was followed by other further final reminders, culminating with a final reminder dated 25 May 1985. There is then a letter dated 31 March 1986, from the defendant to the plaintiff referring to a drawing limit of RM520,000. This forms the subject of complaint by the plaintiff whose case is that, based on the undisputed documentary evidence, it had a facility of RM550,000 as a bridging loan for the Taman Dangi project.

[8] The next event is that by a letter dated 23 September 1986, the defendant offered the plaintiff an end finance facility of RM1 million on terms: (i) that the redemption sum of RM30,000 per individual title be credited to the plaintiff's account; (ii) that all sums received in excess of the redemption monies be utilised to clear the facilities granted to the other group companies. The plaintiff accepted this offer and on 30 March 1987, an end financing agreement was entered into between the plaintiff and the defendant. In the meantime the construction of the houses was progressing and by 31 August 1987, 23 units had been completed. It appears however that the defendant did not live up to its end of the bargain as evidenced by the following facts.

[9] By 30 September 1987, the defendant had approved end finance loans for 16 purchasers. Although as at 10 October 1988, the defendant had approved end finance of RM185,300, this sum was never credited to the plaintiff's account. Further, there were 9 purchasers in respect of whom the defendant had approved loans, obtained charges in escrow but had not credited the monies due under the end finance agreement to the plaintiff's account. The plaintiff complained about this in its letter dated 21 August 1987 to the defendant who did not reply these allegations. The defendant's delay in crediting the plaintiff's account with the sums representing the loans approved to the end-purchasers had disastrous consequences for the plaintiff. For it resulted in the plaintiff's overdraft ballooning with interest payable at 14% pa with monthly rests.

[10] The next event took place on 18 September 1987 when by a letter of that date the defendant appointed a firm of accountants called Hanafiah Raslan & Mohamad as the independent accountant for the Taman Dangi project. The independent accountant's function was to monitor the progress of development and to take control income from the sales of units and payments to creditors. The defendant made the independent accountant a compulsory signatory of the plaintiff's cheques. Hence, no cheque drawn on the plaintiff's account could be honoured unless it also carried the independent accountant's signature. The independent accountant was appointed because the defendant lacked confidence in the plaintiff's ability to manage the project. In other words it took an active part in the actual management of the project together with the plaintiff. The significance of this will be dealt with at the appropriate place in this judgment. What remains to be mentioned is that as at the date of the appointment of the independent accountant, that is to say, 18 September 1987, only 5% of the project work required completion. On this point the evidence of Mr Eapen Thomas (PW2) of Hanafiah Raslan & Mohamed the independent accountant is crucial. He confirmed that as at the date of his appointment 95% of the project had been completed and that a mere RM101,200 was required to complete the project and have the certificate of fitness issued. At this stage it is pertinent to mention that the appointment of the independent accountant had no positive effect. For, it is in evidence that the defendant continued to dishonour cheques despite the fact that they had been signed by the independent accountant, signifying the necessity and the propriety of the payments.

[11] Following the appointment of the independent accountant, the defendant by its letter of 5 November 1987 informed the plaintiff of a restructure of the repayment of the sums owed by the plaintiff and its group of companies to the defendant. The upshot of the restructure was that the total sale price of all the 36 units of houses at Taman Dangi was determined to be RM1,698,000. Further, it was determined by the parties — and there appears to be *consensus ad idem* about this — that the plaintiff had collected a sum of RM 419,172. It followed that there was a sum of RM1,278.828 receivable by the plaintiff from the end purchasers. This sum was amply sufficient to settle the plaintiff's debt to the defendant which at the date of the defendant's letter (5 November 1987) stood at RM770,497.66. As I have already said, the parties had throughout the dealings between them proceeded on the common assumption that the proceeds from the end finance approved by the defendant would go to settle the indebtedness of the plaintiff and its group of companies to the defendant. There is nothing unusual about this sort of arrangement. It is common practice in the housing development industry. Everyone knows about it.

[12] The oral and documentary evidence in the record of appeal shows that the defendant as at the date of its letter of 5 November 1987 was fully aware of the fact that the plaintiff had collected a sum of RM419,172 from the end purchasers. This is what is referred to in the correspondence in the case as 'the unfinanced portion' of the purchase price. Yet, as late as 16 August 1988, the defendant wrote to the plaintiff stating that 'the housing loans approved to some buyers of your houses in Dangi project, Kuala Pilah had not been released for the reason that you have failed to confirm the unfinanced portions of the various selling prices have been fully settled.'

That assertion is, of course, incompatible with the other evidence led at the trial. Later, by a letter dated 10 October 1988, the defendant wrote to the plaintiff confirming (i) that between May 1987 and September 1987 the applications for loans made by 16 purchasers had been approved; (ii) that the loans of five purchasers had been released in full; (iii) that the loans in respect of 2 purchasers had been released in part and (iv) that the loans in respect of nine purchasers, though approved, had not been released.

[13] In support of its case that the defendant's conduct cut across the main object and purpose of the whole contractual arrangement that the parties had entered into, the plaintiff relies, by way of example only, on the evidence of PW4. He was one of the end purchasers. In his case, he executed his sale and purchase agreement with the plaintiff on 25 September 1986. The price was RM42,000 towards which PW4 paid RM20,000. This is reflected in the schedule attached to the defendant's letter dated 5 November 1987. In order to settle the balance of the purchase price, PW4 applied to the defendant for a loan. The defendant charged him a processing fee of RM50. He paid it. He was instructed by the defendant to see the latter's solicitors in relation to the preparation of a registrable charge. He did so. The solicitors charged him for their services. He paid them. On 17 July 1987, the solicitors sent to the defendant the memorandum of charge executed by PW4 for execution by the defendant's attorney. It was established that up to the moment PW4 gave his evidence in this case on, the loan approved for him had not been released and credited into the plaintiff's account. It is noteworthy that PW4 was not cross-examined by learned counsel for the defendant. Neither was any explanation proffered by the defendant for what had happened.

[14] The remaining facts may be shortly stated. In 1989 there was an exchange of correspondence whereby the defendant offered a further facility of RM 45,000 on conditions. As it happened it only released RM2,000. Later it offered to release the remaining RM43,000 on condition that it was granted a limited power of attorney by the plaintiff to sell off the unsold units and to appoint an independent contractor to complete the housing project if that proved necessary. However, the power of attorney prepared on the defendant's instructions was very much wider than that contemplated. The plaintiff did not execute the power. The Taman Dangi housing project stalled for want of funds and was eventually completed by the Tabung Projek Perumahan Terbengkalai or TPPT which is the body established by Government to deal with and complete abandoned housing projects so that end purchasers would not unduly suffer. Later, the plaintiff took out proceedings to recover damages for breach of contract from the defendant. That action, as I have already said, was dismissed.

[15] As I have already said, the real issue before the High Court was whether the defendant had acted in breach of contract. The learned judge, in my very respectful view, took an over simplistic approach to the case in several important respects when ruling in the defendant's favour. What he was obliged to do was to interpret the facts and to determine the true nature of the bargain in substance and not mere form. Unfortunately this was not done.

[16] Let me take the bridging facility first. It is clear from the judgment appealed against that the learned judge accepted the submission of learned counsel for the defendant — a submission also advanced before this Court — that there was here merely an overdraft and not a bridging loan. This appears to be premised on the fact that there are no documents executed by the parties expressly creating a bridging loan facility by way of a fixed loan. With respect this is a purely formalistic argument that ignores the realities of the case and to the substance. And it is against the weight of authority.

[17] When a court is asked to determine the true nature of the bargain between contracting parties it is required to take an objective approach. It must have regard to the factual matrix forming the background to the contract to determine the objective aim or purpose of the transaction. It is the objective view based on the test of the reasonable man that is the determining factor and not the subjective view of a party to the contract. The authorities on the point are legion. But let me start with the two cases which are regarded as seminal in this area of the law of contract.

[18] The first is *Prenn v Simmonds* [1971] 3 All ER 237 where Lord Wilberforce said:

> The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. There is no need to appeal here to any modern, anti-literal, tendencies, for Lord Blackburn's well-known judgment in *River Wear Commissioners v Adamson* (1877) 2 App Cas 743 at 763 provides ample warrant for a liberal approach. We must, as he said, enquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view. Moreover, at any rate since 1859 (*Macdonald v Longbottom* (1860) 1 E & E 977) it has been clear enough that evidence of mutually known facts may be admitted to identify the meaning of a descriptive term.
>
> ...
>
> I may refer to one other case to dispel the idea that English law is left behind in some island of literal interpretation. In *Utica City National Bank v Gunn* (1918) 118 NE 607 the New York Court of Appeals followed precisely the English line. Cardozo J in his judgment refers to 'the genesis and aim of the transaction' citing Stephen's Digest of the Law of Evidence, and Wigmore on Evidence. Surrounding circumstances may, he says, 'stamp upon a contract a popular or looser meaning' than the strict legal meaning, certainly when to follow the latter would make the transaction futile. 'It is easier to give a new shade of meaning to a word than to give no meaning to a whole transaction.' The whole judgment, as one may expect, combines classicism with intelligent realism.

[19] *Prenn v Simmonds* was applied by an unusually strong Federal Court in *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282. Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was) accepted that evidence of the 'genesis' and objectively the 'aim' of the transaction was admissible to interpret a contract. It was also applied by the in *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 24 where the Supreme Court speaking through Mohamed Azmi FJ noted that

A the House of Lords refused to extend the court's interpretative power by allowing pre-contract negotiations to be looked at in aid of the construction of a written document …

[20] As will be seen shortly, this strict approach adverted to by Lord Wilberforce in *Prenn* about the role of pre-contractual negotiations has given way to a more liberal guideline to interpretation. But before I turn to the more recent line of authority, it is necessary to refer to the second case which has had a profound effect on the guidelines to the interpretation of contracts.

[21] The case is *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 where Lord Diplock in laying down the objective approach to interpretation said:

While deprecating the extension of the use of the expression 'purposive construction' from the interpretation of statutes to the interpretation of private contracts, I agree with the passage I have cited from the arbitrators' award and I take this opportunity of restating that, if a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

[22] The first in the trilogy of cases that I would mention as presently holding the field in contractual interpretation is *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, where Lord Steyn said this:

In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And *the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language*. In contradistinction to this modern approach Lord Greene M.R.'s judgment in *Hankey v Clavering* [1942] 2 KB 326 is rigid and formalistic. (Emphasis added.)

[23] The second is *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 where Lord Hoffmann laid down five propositions pertaining to interpretation:

My Lords, I will say at once that I prefer the approach of the learned judge. But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds* [1971] 3 All ER 237 at 240–242; [1971] 1 WLR 1381 at pp 1384–1386 and *Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570; [1976] 1 WLR 989, is always sufficiently appreciated. *The result has been*, subject to one important exception, *to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual*

baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows.

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. *Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352; [1997] 2 WLR 945.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. (Emphasis added.)

[24] The last is *Bank of Credit and Commerce International SA v Munawar Ali* [2001] UKHL 8 where Lord Clyde said:

> The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement. The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances.

[25] Having regard to the background of the surrounding circumstances in which the facility was granted as well as the objective aim of the transaction, there is no doubt whatsoever that the money that was lent by way of the overdraft in this case was in fact a bridging loan for the Taman Dangi project. It was not a true overdraft as ordinarily understood between a banker and his customer. Its true character as a bridging loan is revealed when you look at the purpose of the whole transaction in its proper context and against the matrix of fact forming the background.

The background of circumstances in this case includes, of course the knowledge of the defendant of the purpose of the whole transaction. I have already referred to it in paragraph 3 of this judgment.

[26] With respect, the learned judge's approach influenced as it was by the defendant's argument, with respect, ignores the realities of the case. Had the learned judge applied the *Prenn v Simmonds* approach read with Lord Hoffmann's proposition (2) in the *Investors' case*, he would have rejected the defendant's contention that this was a case of a simple overdraft and nothing else.

[27] There is an additional ground which was readily available to the learned judge to hold that it was not open to the defendant to argue that the overdraft facility was not a term loan. There is evidence which goes to show that the parties themselves regarded the overdraft to be a bridging facility. For example, let me quote from the evidence of DW3:

> Q: (Referred to Pg 33,50,67 of AB1) Do you agree that the facilities refer to a bridging facility of 550,000.00 for Taman Dangi Project.
>
> A: I agree.

[28] Once the parties had proceeded upon the common assumption that the overdraft facility was indeed a bridging loan, it was unjust for the defendant to seek to depart from the assumed basis. Neither was it open to the learned judge to say that it was not a bridging loan. On this point I need do no more than quote from the judgment of this Court in *MBF Finance v Low Ping Ming* [2005] 1 CLJ 305:

> Clearly the parties had acted on the agreed assumption that payment to Avian would suffice for the purpose of cl 2. It would be unjust to allow the respondents to go back on the assumption pursuant to the operation of what is called estoppel by convention. Such an estoppel arose in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1981] 3 All ER 577; a case cited with approval by Gopal Sri Ram JCA in writing for the Federal Court in. *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331. In the former case the A Co negotiated with the X Bank for a loan to the B Co, a subsidiary of the A Co, for the purpose of acquiring and developing a property in the Bahamas. It was agreed that the loan was to be secured by a mortgage on the property and also by a guarantee from the A Co In the guarantee, the A Co promised the X Bank, in consideration of the bank's giving credit to the B Co, to ' pay you … all moneys … due to you ' from the B Co This was an inappropriate form of words since the loan to the B Co was not made directly by the X Bank but by one of its subsidiaries, the Y Bank, with money provided by the X Bank: hence, if the guarantee were read literally, it would not apply to the loan since no money was due from the B Co to the X Bank. The English Court of Appeal took the view that this literal interpretation would defeat the intention of the parties, and held that, on its true construction, the guarantee applied to the loan made by the Y Bank.

[29] The learned judge held the defendant not to have been in breach of contract. With respect I am unable to agree with this finding. Consider the following facts. First, the sum agreed to be lent was RM550,000. But the defendant arbitrarily and unilaterally reduced this to RM520,000. There can be no dispute about this as the defendant's witness DW3 made the following important concession:

Q: The limit has been reduced from 550,000 to 520,000.

A: I agree.

[30] In addition to this is the undisputed fact that the defendant had delayed in releasing into the plaintiff's account loans already approved by way of end finance. This point has already been discussed earlier in this judgment. To recall, the defendant's answer was that this was caused by the plaintiff's failure to disclose the sums it had collected from the end purchasers. As has already been demonstrated earlier in this judgment there is no truth in this contention as the plaintiff had already furnished particulars of the unfinanced portion to the defendant. The other point made by learned judge is that the plaintiff failed to pay the unfinanced portion into its account. But, as already discussed earlier in this judgment, it was the defendant who insisted that the unfinanced portion be paid into the accounts of the other companies in the plaintiff's group to ensure that those accounts did not fall into default. This is precisely what the plaintiff did. Having imposed such a condition and the plaintiff having complied with it, the defendant cannot now complain about it.

[31] It was also argued by learned counsel for the defendant that the plaintiff had exceeded the overdraft limit as one had to take into account the interest element on the overdraft that kept had to be added onto the sum owing. The short answer to this is clause 5 which requires that interest should not be taken into account when determining whether the overdraft limit had been exceeded.

[32] During his oral argument, learned counsel for the defendant made two other points. First, he submitted that it was the plaintiff who had acted in breach of contract by not meeting its contractual obligations. Despite this, the defendant was doing its utmost to help the plaintiff to successfully complete the Taman Dangi project. And that is why it approved the end financing. Looking at the evidence in its totality, I am unable to accept this to be the case. But let me assume for a moment that the plaintiff had in fact acted in breach of contract. What then is the consequence of the defendant in not terminating the contract then and there? The answer lies in those fundamental principles that underlie the law of contract. You must begin with s 40 of the Contract Act 1950 which says this:

> 40. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

So, when the plaintiff broke the contract, the choice was with the defendant to put an end to the contract or to affirm in its continuance. In the words of Seah FJ in *Ganam Rajamany v Somoo Sinnah* [1984] 2 MLJ 290:

> A wrongful repudiation by one party cannot, except by the election of the other party, so to treat it, put an end to an obligation; if the other party still insists on performance of the contract the repudiation is what is called 'brutum fulman' that is, the parties are left with their rights and liabilities as before. A wrongful repudiation of a contract by one party does not of itself absolve the other party if he sues on the contract from establishing his right to recover by proving performance by him of conditions precedent [*per* Lord Wright in *Edridge v Sathna* (1933) 60 IA 363].

[33] It follows that a party to a contract who affirms in its continued performance must himself perform his obligations. I have looked in vain for a clearer statement of the law on this point than that made by Ma JA in the Court of Appeal of Hong Kong in *Bill Keh Lung v Don Xia* [2003] 679 HKCU 1 where he said:

> All I would add in relation to the aspect of acceptance of breach is that the facts of the present case starkly demonstrate the application of the principle that where a repudiatory breach takes place, in order to terminate the contract, the so-called innocent party must clearly and unequivocally accept the repudiation. If he does not do so, *he will run the risk of being in breach himself were he not to perform his side of the bargain and thereby allow the original wrongdoer to 'turn the tables' on him*: see *Frost v Knight* (1872) LR 7 Exch. 111; *Avery v Bowden* (1855) 5 E & B 714; (1856) 6 E & B 953. The basis for this conclusion (often ignored in the business world) is that *unless a contract is terminated, it remains in existence for the benefit of the wrongdoer as well as the innocent party*. (Emphasis added.)

[34] So too here. Once the defendant elected to affirm in the continuance of the contract by agreeing to provide end finance, it was bound to do so. Earlier in this judgment, when discussing the chronology of events, I have already adverted to those instances which clearly disclose a breach by the defendant of its obligation to credit the plaintiff's account with the end finance monies timeously. The defendant knew that delays on its part to meet its obligation would result in financial ruin for the plaintiff. To put the point at rest, let me quote from the evidence of DW1:

> Q: Completion and success of Taman Dangi Project would be crucial for settlement of plaintiff's account and the amount of related companies.
>
> A: I agree.

And in another part of his evidence he says this:

> Attachment was referred in my letter. This is shown at p 157 of AB-1. I agree that in respect of the balance receivable it would be from balance purchase price received from the purchasers that the Plaintiff would get funds into its account and regularise its account from the bank and get profits from the balance.

[35] If the question is asked, who caused the collapse of the Taman Dangi project, an objective view of the facts and evidence shows that it was the defendant. There is therefore no doubt that the defendant was clearly in breach of contract.

[36] That brings me to the second point made by learned counsel for the defendant. He says that even if there was a breach by the defendant, the plaintiff can recover nothing as it was another company in the group and not the plaintiff that was the developer. This answer is singularly devoid of merit and the answer to it is not difficult to find. It lies in the defendant's own conduct. If you examine the documentary evidence you will see that throughout their business relationship the defendant regarded the plaintiff and the group of companies to which it belonged as one and the same entity. That is why the defendant in its letter dated 23 September 1986 required the plaintiff to utilise all sums received in excess of the redemption monies to pay and settle the monies owing from the other companies in the group. Having conducted itself in this fashion towards the plaintiff it is, in my judgment,

not open to the defendant to change its stance now and choose to treat each company in the group as a different entity. It is not a question of the court lifting the corporate veil (*Adams v Cape Industries Plc* [1990] Ch 433) or the companies in the group being treated as a single economic unit as was done in *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852, a case which is at present of doubtful authority (see, *Woolfson v Strathclyde Regional Council* [1978] SLT 15). It is merely an example of equity acting *in personam* whereby the defendant is estopped from asserting that each company in the plaintiff's group of companies is a distinct and separate entity because it would be unjust for it to do so. As the Federal Court observed in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd*, estoppel is:

> a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

[37] Earlier in this judgment I said that I would deal with the appointment of Hanafiah Raslan (in particular Mr Eapen Thomas of that firm) as the independent accountant of the plaintiff to monitor the physical and financial progress of the Taman Dangi development. I do so now. I have already referred to the facts relevant to this appointment in paragraph 10 of this judgment. I merely regurgitate them here because it is important to determine the effect in law of the consequence of this appointment and its terms. Let me quote from the evidence of Mr Thomas:

> We were called in to discuss loan given to Kwan Chew Holdings. The bank was having a problem to monitor monies coming in and out of the bank. The bank told us they were appointing us. Thereafter I received the said letter. I was to establish the status of the completion of the development and report the progress. The development is for Taman Dangi project.
>
> Construction was only 95% completed. All monies due to the company was received and banked into the company's bank account and also to ensure the payment of creditors.
>
> The Plaintiff did not agree to pay the fees of HRM. I was advised to proceed with the appointment and the bank would resolve the fees with the Plaintiff.
>
> ...
>
> We were held responsible for all funds going out of the accounts. Our objective was to make the necessary payments to ensure that the houses were given certificate of fitness. All cheques had to be signed by one officer from HRM and one officer of Plaintiff company. The Plaintiff company cannot issue cheques independently.

[38] There are three points I would make about the appointment of the independent accountant. First, there was no agreement between the plaintiff and the defendant that the independent accountant was to be the plaintiff's agent. It must therefore follow in accordance with the general principles of agency that the independent accountant was the defendant's agent. In this respect it is not necessary to go further than the classic statement of principle by Lord Cranworth in *Pole v Leask* (1860) 54 ER 481:

> No one can become the agent of another person except by the will of that person. His will may be manifested in writing, or orally or simply by placing another in a situation in which

A according to the ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him.

[39] Now apply that to the facts here. It was the defendant who appointed — or B to adopt the words of Lord Cranworth, placed — the independent accountant. Absent an agreement to the contrary — and there is no such agreement here — the independent accountant was the defendant's agent. It follows that the defendant, acting by its agent, was in truth and fact participating with the plaintiff in the running so much of the latter's business as concerned the Taman Dangi project. C And that brings me to the second point I would make.

[40] This is a case in which the relationship between the parties began as one of banker and customer *simpliciter*. It was a purely contractual relationship. The defendant was the lender and creditor and the plaintiff was the borrower and debtor. However, in mid-stream, this relationship of debtor and creditor appears to D have had superimposed on it another special relationship. That this may happen has been recognised by high authority. In *Shanti Prasad Jain v Director of Enforcement AIR* 1962 SC 1764, Venkatarama Aiyar J when delivering the judgment of the Supreme Court of India approved the following statement of principle in *Paget's Law of Banking*, (6th Ed)

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> [S]uperimposed on this general relationship of banker and customer there may be special relationships arising from particular circumstances and requirements' and that the express terms of those relationships override the implied terms arising from the general relationship.

F **[41]** I would mention that it is implicit in the judgment of Lord Parker CJ in *Midland Bank Ltd v Conway Borough Council* [1965] 2 All ER 972, that in the special circumstances of a particular case a special relationship may be superimposed on an ordinary banker and customer relationship.

G **[42]** Now for the third point I wish to make. It is this. In the peculiar circumstances of this case, the special relationship is fiduciary in nature. In other words, upon the defendant appointing the independent accountant as compulsory signatory of all the plaintiff's cheques, the defendant stood in a fiduciary position to the plaintiff as the latter's joint venturer.

H **[43]** A joint venture is defined by *Williston on Contracts* (3rd Ed, 1959) Volume 2 at pp 555–556 as follows:

> In summary, then, a working definition of joint venture based on the actual judicial decisions may be thus formulated: *A joint venture is an association of persons, natural or* I *corporate, who agree by contract to engage in some common, usually ad hoc undertaking for joint profit by combining their respective resources, without however, forming a partnership in the legal sense (of creating that status) or corporation; their agreement also provides for a community of interest among the joint venturers each of whom is both principal and agent as to the others within the scope of the venture over which each venturer exercises some degree of control.* (Emphasis added.)

[44] True that there is no formal written joint venture agreement in this case. But I do not regard that as being an impediment. In my judgment, it is open to a court on an objective assessment of the proved and admitted facts to conclude that the true relationship between litigating parties was a joint venture. Just as a partnership may be implied by the conduct of parties (see *Mirzamal Bhagwan Das v Rameshwar AIR* [1929] All 536; *Jakiuddin v Vithoba AIR* [1939] Nag. 301; *Johnson v Murray* [1951] 2 WWR (NS) 447 at p 448; *Steward v Donnelly* [2001] 108 ACWS (3d) 715), so too may a joint venture.

[45] If the facts of this case are carefully analysed they fairly fit into Williston's definition. Here you have an association of two corporate persons who have by their conduct agreed to engage in a common ad hoc undertaking, namely, the Taman Dangi project for joint profit without forming a partnership in the legal sense with each of them exercising some degree of control over the venture — the plaintiff having control over the construction and the defendant over finance. And that control over finance being exercised by the defendant through its authorised agent, the independent accountant.

[46] In *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474, Jemuri Serjan (CJ, Borneo) dealt with the legal consequences of a joint venture as follows:

> With respect to the question of fiduciary relationship between the parties, learned counsel for the respondent referred us to the definitions of 'Trust' and 'Trustee' in the Specific Relief Act 1950 (Act 137) where fiduciary ownership and fiduciary character are included. It is the respondent's case that a fiduciary relationship is established between the appellant and the respondent when they entered into the joint venture agreement. He supported his proposition by citing the Australian Supreme Court case of *Brian Pty Ltd v United Dominions Corp Ltd* [1983] 1 NSWLR 490. Samuels JA at p 506 says that after reviewing the authorities, he is of the opinion that joint venturers owe to one another the duty of utmost good faith due from every member of a partnership towards every other member. In the same case Hutley JA at p 496 has this to say on this subject:
>
> > Though joint venture agreements are common, particularly in the resource development field, there is little authority as to the responsibilities of the joint venturers, inter se. In *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321, what was described as a joint venture was held to be a partnership. *That joint ventures have fiduciary relationships, inter se would seem to be essential for the efficacy of the device*.
>
> In the High Court of Australia case of *Jenyns v Public Curator (Q)* (1953–54) 90 CLR 113 Dixon CJ, McTiernan and Kitto JJ have this to say at p 133:
>
> > We are not here dealing with any of the traditional relations of influence or confidence — solicitor and client, physician and patient, priest and penitent, guardian and ward, trustee and cestui que trust. It is a special relationship set up by the actual reposing of confidence. It is therefore necessary to see the extent and nature of the confidence reposed and whether it involved any ascendancy over the will of the person supposedly dependent on the confidence.
>
> The judges here were talking about fiduciary relations between the parties. In the case of *James Birtchnell & Anor v The Equity Trustees, Executors and Agency Co Ltd & Anor* (1928–30) 42 CLR 384 Dixon J at p 407 explains the fiduciary relationship between partners and how the relationship is to be determined. This is what he says:

> The relationship between partners is, of course, fiduciary. Indeed, it has been said that a stronger case of fiduciary relationship cannot be conceived than that which exists between partners. 'Their mutual confidence is the lifeblood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on' (per Bacon VC in *Helmore v Smith* (1890) 15 App Cas 223 at p 225; (1886) 35 Ch D 436 at p 444). The relation is based, in some degree, upon a mutual confidence that the partners will engage in some particular kind of activity or transaction for the joint advantage only. In some degree it arises from the very fact that they are associated for such a common end and are agents for one another in its accomplishment. Lord Blackburn found in this consideration alone sufficient reason for the fiduciary character of the partnership relation (*Cassels v Stewart* (1881) 6 App Cas at p 79). *The subject matter over which the fiduciary obligations extend is determined by the character of the venture of undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties, whether embodied in written instruments or not, but also from the course of dealing actually pursued by the firm*. Once the subject matter of the mutual confidence is so determined, it ought not be difficult to apply the clear and inflexible doctrines which determine the accountability of fiduciaries for gains obtained in dealings with third parties.' (Emphasis added.)

That passage was approved by Lord Wilberforce in the case of *New Zealand Netherlands Society Oranje Incorporated v Kuys & Anor* [1973] 2 All ER 1222 At p 1226. Lord Wilberforce says, after quoting the relevant passage of Dixon J's judgment:

> This was said in the context of a partnership but the principle must be of general application.

[47] Applying the well established principles discussed by the very learned Chief Justice of Borneo in the *Newacres case*, I would reiterate my view that the defendant as a joint venturer stood in a fiduciary position to the plaintiff in relation to the approval and disbursement of the end finance. Its conduct already described in the earlier paragraphs of this judgment amply demonstrate a want of what Chief Justice Cardozo described in *Meinhard v Salmon* (1928) 249 NY 456 at p 464: as 'the punctilio of an honour the most sensitive'. If it had acted properly in crediting the plaintiff's account with the end finance and in not dishonouring cheques drawn by the plaintiff and co-signed by the defendant's agent, the Taman Dangi project would have been successful and the plaintiff would have made a profit.

[48] It is true that the plaintiff did not go expressly forward on its case in the court below on the basis that the defendant was a fiduciary. But all the relevant facts that were necessary to establish that special relationship were pleaded and all the relevant evidence to prove it was led. That, on well established authority is sufficient. See, *Lever Brothers Ltd v Bell* [1931] 1 KB 557 (applied by this court in *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600), where Scrutton LJ said that 'The practice of the courts is to consider and deal with the legal result of pleaded facts, although the particular legal result alleged is not stated in the pleading.' It was therefore certainly open to the learned judge to have hearkened to the facts and evidence and held the defendant to be a fiduciary.

[49] Let me say once again that quite apart from any issue of a fiduciary duty, on the facts the plaintiff has established its case of breach of contract. It was entitled to

judgment. The learned trial judge with respect erred in his appreciation of the facts. To borrow the more elegant language of Raja Azlan Shah FJ (as His Highness then was) in *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119, 'certain salient features of this aspect of the evidence were missed or were not properly appreciated' by the learned trial judge.

[50] For the reasons already given, I would allow this appeal and set aside the orders made by the learned judge. There shall be judgment for the plaintiff for damages to be assessed. The case is remitted to the senior assistant registrar of the High Court for assessment of damages. The assessed damages shall carry interest at the rate of 8% from the date of the writ. The plaintiff shall have its costs here and in the court below.

[51] My learned brother, Hashim Yusoff JCA has seen this judgment in draft and has expressed his agreement with it.

Appeal allowed.

Reported by Sally Kee